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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FIRST APPELLATE DISTRICT
DIVISION FOUR

In re TENISHA D., a Person Coming
Under the Juvenile Court Law.

THE PEOPLE,
Plaintiff and Respondent,

v.

TENISHA D.,
Defendant and Appellant.

A107490

(Contra Costa County
Super. Ct. No. J03-02257)

Appellant Tenisha D. was found to have committed a first degree residential burglary (Pen. Code, §§ 459, 460, subd. (a)). The juvenile court ordered her a ward of the court and detained her pending placement. On appeal, appellant contends that the victim's statement introduced as evidence supporting the burglary finding should have been excluded for offending the Confrontation Clause of the Sixth Amendment and, in the alternative, failing to satisfy the spontaneous statement exception to the hearsay rule. We disagree on both points and affirm.

I.

In June 2004, Antioch Police Officer Rafael Borrayo began one evening investigating appellant, at her apartment complex, for a crime unrelated to that at issue here. He ended the night taking the statement of a man whose apartment in the same complex was burgled while Officer Borrayo was in the vicinity. That statement implicated appellant in the burglary and is the crux of this appeal.

On June 8, 2004, Officer Borrayo went to a multi-unit apartment complex in search of appellant. He intended to question her about a crime he was investigating and studied a photo lineup that included her picture before entering the complex.

Shortly thereafter, Officer Borrayo observed appellant and three accomplices run out of an apartment towards the main thoroughfare adjacent to the complex. The officer then heard a male voice yelling from within the apartment that appellant had just fled. Officer Borrayo drew his gun and entered the apartment where he found two men. A cable television converter box laid slung over the television supported only by its cord and a window directly behind the television had been broken.

One of the men inside the apartment, Oscar Resco, made two separate statements to Officer Borrayo. First, immediately upon entering the apartment Borrayo observed Resco shaking his arms with clenched fists, pointing at the cable box and yelling something to the effect of “they were trying to take something,” in a high pitched voice. Resco told Borrayo that another acquaintance, Roco,¹ was in the apartment before and during the robbery but left shortly thereafter. After hearing these first remarks, the officer ran outside in an attempt to locate those he initially saw flee the apartment. Borrayo returned to the apartment 10 to 15 minutes later. The officer found Resco to be in a very similar condition to that before he gave chase. That is, he observed Resco pacing around his living room and acting jittery. When he began describing what happened, Resco spoke with a stutter and frequently changed topic in mid sentence. In Borrayo’s words, Resco “couldn’t get a clear statement [out] until he . . . calm[ed] down.”

Resco gave his version of events only after Borrayo spent several minutes relaxing Resco by patting him on the shoulder, sitting him down, and telling him some jokes. While watching television in his apartment, Resco heard a window break. He then saw appellant and three Black males enter the room. Resco told all of them to leave, but

¹ We refer to this person as Roco, though his actual name is not clear. Officer Borrayo testified that Resco identified the person as “Roco” or “Loco,” but only as a nickname.

appellant reached for the cable box and attempted to take it. Resco reacted by picking up what is described as a crystal ball and threatening to throw it at the intruders at which point they fled. The record is silent as to whether these remarks to Borrayo were in response to questioning or offered without instigation. Resco did not give Borrayo permission to search the apartment. He did give Borrayo permission to search the cable box for fingerprints, but the officer eventually chose not to do so. Finally, Borrayo showed Resco the aforementioned photo lineup, but the record is silent as to whether Resco identified appellant from the lineup.

At her jurisdictional hearing on July 1, 2004, appellant objected to the introduction of Resco's second statement to Officer Borrayo on hearsay grounds.² The court found the elements of the spontaneous utterance exception to the hearsay rule met, and overruled the objection. On July 15, 2004, appellant moved for a new trial on the grounds that the admission of Resco's statement violated her Sixth Amendment right to confrontation. That motion was denied and this appeal followed.

II.

Appellant contends that Resco's second statement is inadmissible hearsay because it does not qualify for the spontaneous utterance exception to the hearsay rule. Hearsay evidence is admissible under that exception if two conditions are met.³ The statement must (a) "purport[] to narrate, describe, or explain an act, condition or event perceived by the declarant; and (b) [be] made spontaneously while the declarant was under the stress of excitement caused by such perception." (Evid. Code, § 1240.) Only statements "undertaken without deliberation or reflection" may qualify for the exception. (*People v. Morrison* (2004) 34 Cal.4th 698, 718.) Therefore, the state of mind of the declarant is the critical determinant in an evaluation of whether he or she was under the stress of the excitement caused by his or her observation. Other factors, including the timeframe of

² Borrayo was the only witness at the hearing; he said that he had been unable to get back into contact with Resco.

³ The parties do not dispute that Resco's second statement to Borrayo constitutes hearsay evidence.

the utterance and whether it was made in response to questioning, “ ‘may be important, but solely as an indicator of the mental state of the declarant. . . .’ ” (*People v. Brown* (2003) 31 Cal.4th 518, 541.) In any case, “[t]he trial court must consider each fact pattern on its own merits and is vested with reasonable discretion in the matter.” (*People v. Morrison, supra*, at p. 719.) We review the trial court’s decision for abuse of discretion. (*People v. Pirwani* (2004) 119 Cal.App.4th 770, 787, citing *People v. Poggi* (1988) 45 Cal.3d 306, 319.)

The trial court did not exceed the broad limits of its discretion when it admitted Resco’s second statement as a spontaneous declaration. The record indicates that when Officer Borrayo returned to the apartment after searching for appellant, he found Resco in an excited state. It is undisputed that the victim’s apartment had been burglarized less than 20 minutes earlier. It took a good deal of effort just to calm Resco down enough to recite a coherent version of events. We are in no position to disturb the trial court’s judgment that, taken as a whole, these factors caused Resco’s statement to be made without deliberation or reflection.

Appellant evidently concedes that the 10-to-15 minute interval between the break-in and Resco’s second statement to the officer has little bearing on whether it was spontaneous. Instead, she argues that several other factors conspired to strip the statement of spontaneity. She contends that Resco’s reflective powers were no longer in abeyance because he (1) stopped shaking or speaking in a high pitched and shuddering voice when he made his second statement, (2) spoke in response to Borrayo’s questioning, (3) reiterated that Roco had been in the apartment during the burglary, and (4) prevented Borrayo from searching the apartment.⁴ As such, his statement was made with deliberation or reflection and so does not meet the spontaneous utterance exception’s requirements. (See *People v. Morrison, supra*, 34 Cal.4th at p. 718.)

⁴ Appellant also adds to the list that Resco allegedly asked Borrayo not to fingerprint the cable box, but that assertion is contrary to the record.

These events do not support the conclusion that the trial court abused its discretion by admitting the statement. While it is true that the root of the analysis must be whether the statement was made under stressful circumstances and while the declarant's reflective powers were in abeyance, *People v. Pirwani*, *supra*, 119 Cal.App.4th at page 789, to the extent that appellant may be taken to argue that any coherent statement is, by definition, a reflective one, we disagree. Resco's recollection that another friend was present but left, reluctance to allow a search of the apartment, and ability to speak without shrieking or shuddering may well be indications that he was calm enough to speak coherently to the officer. However, the "fact that the declarant has become calm enough to speak coherently . . . is not inconsistent with spontaneity. [Citations.] To conclude otherwise would render the exception virtually nugatory: practically the only 'statements' able to qualify would be sounds devoid of meaning." (*People v. Poggi*, *supra*, 45 Cal.3d at p. 319.)

Nor does the possible presence of police questioning make Resco's statement too reflective for the exception. While a statement blurted out to an officer carries with it heavy indicia of spontaneity, the existence of police questioning does not "ipso facto deprive the statement of spontaneity." (*People v. Farmer* (1989) 47 Cal.3d 888, 904, overturned on other grounds as noted in *People v. Waidla* (2000) 22 Cal.4th 690, 724, fn. 6.) Questioning is, instead, one factor among many that may indicate the declarant's state of mind. For example, simple inquiries by the police have historically not deprived statements of spontaneity. (*Farmer*, *supra*, at p. 904, citing *People v. Washington* (1969) 71 Cal.2d 1170, 1176-1177; *In re Damon H.* (1985) 165 Cal.App.3d 471, 475; *People v. Bernalley* (1960) 185 Cal.App.2d 326, 329-330.) Alternatively, a more structured inquiry may well lead to a statement that lacks enough spontaneity to qualify for the exception. (*Farmer*, *supra*, at p. 904.) Here, the record is unclear as to whether Resco's second statement was prompted by a simple inquiry, detailed questioning, or by no act of Officer Borrayo at all. Without more, therefore, it is impossible to say that the trial court abused its discretion when determining that, like Resco's ability to speak coherently, any questioning by Borrayo did not strip Resco's second statement of spontaneity.

III.

Appellant's principal complaint is that Resco's second statement to Officer Borrayo constitutes testimony. Therefore, she urges, its admission is a violation of the Confrontation Clause under *Crawford v. Washington* (2004) 541 U.S. 36 [124 S.Ct. 1354] (*Crawford*). Assuming, arguendo, that this argument was not waived by appellant's failure to raise it before her motion for a new trial as the People contend, it nevertheless fails on the merits.

Prior to the United States Supreme Court's 2004 decision in *Crawford*, the admissibility of hearsay evidence under the Confrontation Clause was a rather straightforward inquiry. If the hearsay was admissible under a "firmly rooted" exception to the hearsay rule or showed other "indicia of reliability," then it was admissible under the Confrontation Clause as well. (*Ohio v. Roberts* (1980) 448 U.S. 56, 66.) In *Crawford*'s wake, however, the focus has shifted.

According to *Crawford*, Confrontation Clause violations hinge on testimony, not hearsay exceptions or indicia of reliability. Put simply, "[w]here testimonial evidence is at issue, . . . the Sixth Amendment demands . . . unavailability and a prior opportunity for cross-examination." (*Crawford, supra*, 541 U.S. at p. ____ [124 S.Ct. at p. 1374].) *Crawford* identifies two focal points for the inquiry into what constitutes testimony. First, a pretrial statement is testimonial hearsay if the declarant " 'would reasonably expect [it] to be used prosecutorially,' " or if it was made " 'under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial.' " (*Id.* at p. 1364.) The examples provided are affidavits, custodial examinations, prior testimony, and "formalized" material like depositions and confessions. (*Ibid.*) In addition, the testimonial concept applies "at a minimum to prior testimony at a preliminary hearing, before a grand jury, or at a former trial; and to police interrogations." (*Id.* at p. 1374.) Under this guidance, appellant's contention fails.

It is unlikely that any statement which qualifies for the spontaneous utterance exception to the hearsay rule would offend the Confrontation Clause under *Crawford*, and this one surely does not. At the core of the spontaneous statement exception is the

requirement that the utterance “be made without reflection or deliberation due to the stress of excitement.” (*People v. Corella* (2004) 122 Cal.App.4th 461, 469.) The inability to deliberate and reflect is a different aspect of the same emotional ingredients needed to place a statement beyond *Crawford*’s reach. (See *Crawford*, *supra*, 541 U.S. at p. ____ [124 S.Ct. at p. 1364] (declarant or reasonable witness in declarant’s position must believe that statement would be used at later trial).) Specifically, statements “made without reflection or deliberation are not made in contemplation of their ‘testimonial’ use in a future trial.” (*Corella*, *supra*, at p. 469.) Here, the record supports the notion that Resco lacked reflection or deliberation. We therefore conclude that, under the circumstances, he gave his statement without considering its use in a future trial and was reasonable in so doing. (*Ibid.* [fact that witness made statement while dominated by stress meant it was not made with knowledge of future use at trial].)

We also reject appellant’s contention that Resco’s statement resulted from a police interrogation or its equivalent. *Crawford* tells us that, at a minimum, statements elicited through a formal police interrogation are testimonial. (*Crawford*, *supra*, 541 U.S. at p. ____ [124 S.Ct. at p. 1374].) The farthest *Crawford* goes in defining a police interrogation is to make analogies to examinations by English justices of the peace. (*Id.* at pp. 1359, 1364-1365.) If nothing more, that analogy “indicates that, under *Crawford*, a police interrogation requires a relatively formal investigation where a trial is contemplated.” (*People v. Corella*, *supra*, 122 Cal.App.4th at p. 468; *Crawford*, *supra*, at p. 1365, fn. 4 [statement given under structured police questioning qualifies under “any conceivable definition].) No such formalities are present here.

Resco’s spontaneous statement about a traumatic event that took place only a few minutes earlier did not become the product of a police interrogation simply because an officer received the information. (See *People v. Corella*, *supra*, 122 Cal.App.4th at p. 469.) In *Corella*, the Second District recently considered the same issue on very similar facts. We agree with its observation that preliminary investigations “at the scene of a crime shortly after it has occurred do not rise to the level of an ‘interrogation.’ ” (*Ibid.*) As we have already discussed, it is not clear from the record here that Resco’s description

of the events was prompted by any questioning at all. Even were that not the case, however, there are no other facts illustrative of a formal investigation—no arrest or questioning at the police station, for example. For these reasons, the circumstances surrounding Resco’s second statement did not amount to a police interrogation.

The Fifth District’s decision in *People v. Sisavath* (2004) 118 Cal.App.4th 1396 does not require a different conclusion. In that case, a child sexual abuse victim first made a statement to an officer at the scene, though some time after the incident, and then made another statement to an investigator specifically trained to interview children suspected of being abused. (*Id.* at p. 1400.) According to the *Sisavath* court, the victim’s first statement to the officer was clearly testimonial under *Crawford*, because it was “ ‘knowingly given in response to structured police questioning.’ ” (*Id.* at p. 1402.) In spite of its tempting language, appellant’s reliance on this passage is misplaced.

In *Sisavath*, the prosecution conceded that the victim’s statement to the officer at the scene was testimonial. (*People v. Sisavath, supra*, 118 Cal.App.4th at p. 1402.) Therefore, the legal analysis and factual presentation in the opinion focused entirely on the victim’s other statement. Since the reasoning behind the *Sisavath* court’s pronouncement that the first statement constituted clear testimony is not apparent, *Sisavath* provides no persuasive support for appellant’s position.

IV.

The dispositional order is affirmed.

Kay, P.J.

We concur:

Reardon, J.

Sepulveda, J.